No. 3686

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,

Appellant,

vs.

OTIS E. MILES et al.,

Appellees.

BRIEF FOR APPELLEES.

H. W. HUTTON,
Proctor for Appellees.

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BRIEF FOR APPELLEES.

In the above appeal, the lower court found as follows (page 26 of Transcript):

> "It is admitted that libelants are entitled to some award for salvage, the only question being as to the amount. Considering all the circumstances, I think an award equal to two months' pay to each libelant will be fair. A decree will be entered accordingly."

The only question on this appeal is, Is the above amount unfair?

The values salved were as follows (pages 23 and 24 Transcript):

The value of the vessel was	1,762,000.00
The cargo	1,500,000.00
	3,262,000.00

The total award was two months pay, which would equal $10,740.00 for her master and crew. Our contention is that that amount is low, rather than high.

The Deuel went on shore at high water, with falling neap tides, December 14th, 1919, at 9:05 A. M. The West Inskip backed in, dropped both anchors, and pulled on hawsers from her stern to the stern of the Deuel from 9:15 P. M. to 10:06 P. M. of the 14th (Trans. pages 51-52) and from 8:30 to 10:50 A. M. of the 15th, without any movement of the vessel. The fore peak of the Deuel was leaking, the crew of the Deuel assisted by the crew of the West Inskip and others threw some of the cargo overboard, and shifted the other cargo, the P. M. tide of the 15th serving badly (Transcript pages 42-43). On December 16th at 10:30 A. M. a united effort was made by the West Inskip and the Deuel and at 11:20 the vessel floated,

> "having been towed off by the S. S. West Inskip and into deep water, also assisted by the S. S. Deuel going full speed astern all the time the effort was being made and up to the time of refloating".
>
> (Trans. page 45.)

> "The refloating of the Deuel in such quick time is mainly due to the masterly way in which Captain Tibbets of the West Inskip placed his ship in position and then rendered very efficient service".
>
> (Trans. page 46.)

The crew of the West Inskip unquestionably assisted its master and enabled him to execute the floating of the Deuel.

> "In conclusion it may be said the bottom where the Deuel stranded is rocky and uneven and is much broken up all around. The nearest land above water was fully 1¼ miles off. The position was fraught with danger insomuch that a westerly wind (the prevailing winds at this season) would have materially lessened the Deuel's chances. Moderate and fine weather prevailed."

The above shows that the service was highly meritorious. A Lloyd's surveyor went on board on the 15th, and it appears that on the 15th some of the deckload of lumber was thrown overboard, and on the 16th, it appears as follows:

> "It was then decided by the Lloyd's surveyor ordered the balance of deckload forward and aft thrown overboard to lighten the vessel as quickly as possible."
>
> (Trans. page 53.)

Substantially the same entry appears on Transcript page 48. The surveyor himself says on Transcript page 46 that his charge is made for

> "advising Master, assisting to refloat, taking steamer to Yokohama and reporting on refloating of six hundred yen"

We fail to see why appellants should lay such stress on the charge of the surveyor. He assisted, but he did not take charge, in the work. On the contrary, the Transcript shows the masters of the

vessels executed the orders (Trans. pages 43-44). We do not wish, however, to speak lightly of what anyone did in the successful undertaking; however, we wish to call the court's attention to the fact that no one person is bound by what another charges for his work. The question before the court in this case is, What is a fair award? And again the charge made by the surveyor was made in a country where the purchasing power of money is probably about five or six times greater than it is in this country, and where salaries are five or six times smaller.

Argument.

We think that twenty-five per cent (25%) of a total award is what is usually allowed the crew of a salving vessel. Under that division, the total award in this case would be four times what the lower court awarded the crew, or four times $10,-740.00 or $42,960.00.

It appears that the underwriters had agreed to the sum of $45,000.00 for the whole service; but wished to pay the crew only $5000.00 or about a trifle over 11 per cent. We understand that the $45,000.00 was for the cargo of the Deuel alone (Trans. pages 15 and 19).

Two interrogatories were propounded (Trans. page 11): one as to what the Deuel was expected to pay, and the other what the cargo was expected to pay, and we feel certain the cargo has to pay $45,000.00.

25% of that amount would be	$11,250.00
The amount awarded is	10,740.00
Amount it is small	$ 510.00

or 23.18 per cent of the total, and $45,000.00 is but but 1.377% of $3,362,000.00, the total value of the property salved.

In appellant's brief, the United States offers as reasons for a reduction, cases where the total award was 2½ per cent of the value of the property salved. We submit that it is not injured where but 1.377% is the gross award and the crew fail to get 25% of that.

On page 10 of appellant's brief, the case of The Kia Ora is mentioned. As stated in the brief, it is valueless, as the Court of Appeals increased the amount awarded from $100,000.00 to $150,000.00 in the following citation:

The Kia Ora, 252 Fed. 507.

We call the court's particular attention to that case.

It is stated in the brief that the values of property saved in that case were 2½ times greater than the values in this case. The actual values in that case were $3,901,173.

To be 2½ times greater the total values in that case would have to be $8,155,000.00.

The true increased values in that case are about 16.4% of the values in this case—not 250%, and, on the basis of that case, the total award in this should be $135,940.00.

25% of which to the crew would be $33,764.00.

In the case of The Noelle, also cited, the values were about one-half of what they were in this case. The award was $35,000.00.

Double that would be $70,000.00.

25% to the crew would be $17,500.00.

In this case the West Inskip was engaged on the 14th, 15th and 16th days of December. In the Noelle case, the tug arrived on the scene at 6 A. M. of the 19th, commenced to pull at 10:15 A. M. and the vessel came off at 2:45 P. M. the same day. There is no comparison between the cases as to the merit of the service, the merit being all with this case.

The case of Jacobsen v. The Panama, etc., is of little value as no values are given. The Panama went ashore where no storms ever prevail, on a soft bottom of coral sand, and the Potomac and Gorgas assisted in the work, the latter vessel being there but it is not clear what she did. If the value of the Panama was known, it might appear that that award was larger than this.

In the case of the Teresa Acama, it was claimed that it only took 45 minutes to do the work and that the real floating was done by reason of the salved vessel having pumped out 300 tons of water ballast. She was valued at $2,000,000.00. An award of $12,000.00 was made. The values in that case were but about 61% of the values in this. A proportional award for time consumed and values in this case

would amount to approximately $100,080.00, as it took more than five times as long in this case, and the award to the crew on a basis of 25 per cent would be about $25,000.00. The time actually towing in this case was between four and five hours. In that case 45 minutes. In this case the vessel was engaged in the service the whole of one day and part of two other days. In the Teresa Accama case about 8 hours and 45 minutes.

In the case of the Apalache, the vessel was of the value of $450,000.00. She went ashore on December 24th at high tide. She reduced her draft from 18 to 13½ feet and the tugs arrived at 11 P. M. of the 24th. The vessel came off early on the morning of the 25th, no doubt by reason of her reducing her draft four and one-half feet by pumping out water. The award was $10,000.00, on values alone. Not considering the increased time taken in this case and greater danger, the award would be $72,500.00, as the values here are about 7.25 times greater than in that case. We will now take up what proportion of the total value of a salvage service a crew should get.

In the days of sailing vessels it was never less than one-half; now it seems to run about 25%, as the following cases show:

In Jacobsen v. The Panama, 266 Fed. 793, the crew were allowed one-fourth.

In the F. V. Barstow, 257 Fed. 793, the crew were allowed one-third.

In the case of The Kanawha, 254 Fed. 762, the crew were allowed one-fourth.

In the case of The Meldershim, 249 Fed. 776, the crew were allowed one-fifth.

In the case of The Figueroa, 247 Fed. 358, $30,-000.00 was allowed, the master receiving $5000.00. Of the remaining amount the crew received one-half, the owners of the salving vessel one-half.

In the case of The Coquitlam City, 242 Fed. 767, one-fourth was allowed the crew.

In Conklin v. Lockard, 231 Fed. 540 and 239 Id. 380, one-fifth was allowed the crew.

As to additional cases on total awards, we cite the following authorities:

The Melderskin, 249 Fed. 776.

The vessel was towed 819 miles, the values were $1,450,029.00, the award was $45,000.00.

In the case of

The Celtic Chief, 145 C. C. A. 63,

a stranding case decided by this court, the values were $136,000.00; the award, $19,000.00.

The F. B. Barstow, 257 Fed. 792,

The values were $3,000,000.00; the award, $50,-000.00.

We respectfully submit that the award in this is low and not high.

II.

BEFORE A SALVAGE AWARD CAN BE MODIFIED THERE MUST BE AN ABUSE OF DISCRETION.

The Kanawha, 166 C. C. A. 208;
Jacobsen v. Panama, etc., 266 Fed. 346.

III.

THE UNITED STATES IS LIABLE FOR SALVAGE SERVICES TO THE CARGO.

On page 6 of appellant's brief we find the following:

> "For the salvaging of the privately owned cargo the libelants of course have no claim against the United States."

There are no authorities or argument in the brief on that point. We, however, respectfully call the court's attention to the act of March 9th, 1920, which in terms and spirit makes the United States liable for all claims against a cargo it is carrying, or possesses, and expressly authorizes an action *in personam* against the United States to enforce such claims, it reading in part:

> "Sec. 1. * * * and no cargo owned *or possessed* by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions; * * *
>
> "Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed a

> proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, *a libel in personam may be brought against the United States* or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug operated by such corporation."

The act is found in 41 Stat. at Large, page 525. The title of the act reads:

> "An act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions and for other purposes."

The purposes of the act are explained in

> Banque Russo etc. v. U. S. Shipping Board, 266 Fed. 897, 898-899,

where the court said that it was to prevent ships and cargoes being carried by the United States from being hindered in transportation.

Section 8 of the act expressly makes the United States liable for the payment of the decrees. So we find a law that says that if any cargo in the possession of the United States has been proceeded against, an action *in personam* may be brought against the United States, and that it must pay the decree.

IV.

THE CREW OF ONE MERCHANT VESSEL OWNED BY THE UNITED STATES ARE ENTITLED TO SALVAGE FOR SALVAGE SERVICES RENDERED ANOTHER GOVERNMENT VESSEL.

There does not appear to be anything in the record indicating that the West Inskip was owned by the United States; but if she was it makes no difference. See

> Act of August 1st, 1912, 37 Statutes at Large 242;
>
> Jacobsen v. The Panama, 246 Fed. 347;
>
> Rees v. United States, 134 Id. 347.

And Sec. 10 of the Act of March 9th, 1920, which reads:

> "That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its benefit, and not for the benefit of the crew. * * *

It is clear, therefore, that the crew of a merchant vessel operated by the United States may claim compensation for salvage services rendered another vessel so operated, and cargo in the possession of the United States.

In conclusion, we beg to state, that $10,740.00 does not seem to be a very large amount to pay a crew for work on three different days and saving property worth over three millions of dollars and we fail to see any abuse of discretion.

Salvage compensation is in the nature of a reward, and, for the benefit of trade and commerce, lives are sometimes saved by salvors; and no one can tell when lives will be again in peril on the seas. To stimulate efforts to save life and property in danger on the sea these awards are made. This salvage service was rendered December, 1919. After almost two years of litigation the crew are still struggling for what is justly due them, and met with what we find on page 13 of the government brief, in italics, that one-half month's pay would be enough, when a proper computation of the facts of both cases shows that the award in this case is lower than the award in that. Any argument such as made on that page is fallacious. How can it be possible that a service that took but 45 minutes to perform and a total service of 8 hours and forty-five minutes, on $2,000,000.00 worth of property, can be worth as much as a service that consumed three days, with between four and five hours towing, the throwing of cargo overboard on $3,262,000.00 worth of property?

We respectfully submit the award of the lower court should be increased with costs and interest.

Dated, San Francisco,
October 19, 1921.

H. W. Hutton,
Proctor for Appellees.